IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9123 OF 2005

Abbas Salehbhai Setranjiwala & ors.... Petitioner

versus

Khatijabai E.Merchant & ors. ... Respondents.

Shri N.V.Walawalkar for the petitioners
Shri Sharan Jagtiani with F.U. Lokdawala for the respondent.

CORAM; P.V. KAKADE, J.

DATED; FEBRUARY 20, 2006.

P.C:

1. Heard both the sides. Perused the record. In view of the facts and circumstances, Rule. Rule made returnable forthwith.

2. The petitioner/defendant has preferred this petition against the judgment and order passed by the Small Cause Court, dismissing the Revision Application 82/05 in Interim Notice No.109 of 2005 in R.A.E. suit No. 512/1009 of 1997, confirming the order passed by the lower court rejecting the application made by the defendant for amendment of the written statement, which was made before commencement of the stage of recording of evidence of the parties in the trial.

3. The respondents/plaintiffs have filed the suit for recovery of possession of the suit premises occupied by the petitioner/defendant on various grounds mentioned in the plaint, one of which is the acquision of alternate suitable residential accommodation by the defendant as laid down under section 13(1)(i) of the Bombay Rent Act. The defendant filed written statements. The issues have been framed. The plaintiffs have filed affidavit of examination-in-chief and thereafter the defendant has taken out application for amendment regarding (i) claim of plaintiff is barred by limitation and (ii) suitability of acquired alternate accommodation. The petitioner/defendant has in application for amendment pleaded that the proposed amendments are only clarificatory and the same do not alter the nature of defence. No new case is being set up. The proposed amendments would not cause prejudice or injury to the plaintiff. The said application is resisted by the plaintiffs contending that the defendants have not given any explanation as to why those grounds were not taken at the initial stage. The application for amendment of written statement is an after thought. Under the gulse of amendment, the defendants want to improve the case. It is also pleaded that the plaintiffs have started the evidence.

Hence the application was sought to be dismissed.

4. The trial court after hearing both the parties, recorded the finding to the effect that the defendants have filed the amendment application after the delay of 6 to 7 years and hence not maintainable. Moreover no fresh ground had arisen to make the amendment and the proposed amendment was purely technical and on that ground also the court below rejected the application for amendment.

5. The revisional court after hearing both the parties was of the view that the amendment to extent of limitation was concerned, it being purely technical and could not be allowed, and as far as in respect of suitable accommodation is concerned, it being taking away the rights accrued to the plaintiffs, and it being putting a new case, and the injury caused to the plaintiffs cannot be compensated by cost and as such the revision came to be rejected. Hence the present petition.

6. At the outset it may be noted that the revisional court, after perusal of the pleadings of the defendants and after reading the proposed amendment in the written statement made it clear that, the defendants want to add that the said acquired accommodation is not suitable. If the defendants are allowed to put those

facts in the written statement by way of amendment, then certainly it would amount to putting a new defence in the written statement and thereby it would take away effect of admission given by the written statement. As such there is no specific pleading in the written statement of the petitioner to clarify that the acquired premises are not suitable for the accommodation of all the defendants and their family members. If the defendants are allowed to put those facts in the written statement by way of amendment, then certainly it shall amount to putting up a new defence in the written statement and thereby it will take away effect of admission given by the written statement. That shall prejudice the right of the plaintiff and shall cause injustice to the plaintiff by virtue of Order 6 Rule 17 of CPC. The learned counsel for the respondent sought to put reliance on the decision of this court as well as Apex court in order to show the right accrued by the plaintiff by way of allowing the written statement. However, his argument is based on the assumption that there is valid admission on the part of the defendant in his pleadings which aspect in my considered view is debatable and could be adjudicated in the course of the trial at the time of final hearing. But neither the trial court considered that aspect while dismissing the application for amendment, nor the trial court thought it fit to

pass such decree on the basis of so called admission, pending the suit after the written statement was filed years ago. It is also pertinent to note that the plaintiff also did not seek decree of such alleged admission during the pendency of several years and the question raised for the first time by the revisional court which in my view was besides the issues involved.

7. In this regard the learned counsel for the petitioner sought to put reliance on the ruling of the judgment of a Single Judge of this court in the case of **Badrinarayan Banislal Somani Vs. Vinodkumar K. Shah reported in 2003 (2)_ ALL MR 1040.** The learned Single Judge after taking review of the ratio laid down by the Apex Court in the case of **Estralla Rubber Vs.Dass Estate (P) Ltd. reported in (2001) 8 SCC page 97 as well as Anant Gopal Sheore Vs. The State of Bombay, reported in AIR 1958 S.C. page 915 and A.K.Gupta and Sons Ltd. Vs. Damodar Valley Corpn. reported in AIR 1967 S.C. page 96,** has concluded that once it was apparent that the proposed amendment amounts to additional approach to the same case pleaded by the petitioner, in written statement, the impugned order rejecting such amendment to the written statement cannot be held to be the proper exercise of the jurisdiction of the court below. Apparently, the court has failed to exercise its jurisdiction properly and

the same warrants interference in the revisional jurisdiction, as the impugned order if allowed to remain on record would result in failure of justice. Therefore I am of the considered view that the court below has failed to exercise the jurisdiction properly and the same warrants interference in the writ jurisdiction, as the impugned order if allowed to remain on record, would result in failure of justice.

8. The learned counsel for the respondent also brought to my notice that the jurisdiction of this court contemplated by Article 227 of the Constitution was limited and therefore the present dispute would not be covered by the said Article. However in this regard it must be noted that the law is quite settled on this point and the High Court would have powers under Article 227 of the Constitution to quash the order passed by the lower court. The power of the High court under the Constitution of India is apparent and I have no doubt whatsoever that this court can interfere in this matter under Article 227 of the Constitution.

9. In view of this aspects, rule is made absolute. The petition is allowed in terms of prayer clause (a). Amendment is allowed. The order passed by the revisional court dated 19-11-2005 is hereby set aside. The trial court is directed to grant the amendment and

both the parties would be given opportunity to lead evidence after framing of additional issues if any during the course of the trial.

10. With these directions, the petition stands disposed of with no order as to costs.

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